

**NOT PRECEDENTIAL**

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

SUSAN MILLER,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. 1998/0089
	)	
VIRGIN ISLANDS HOUSING	)	
AUTHORITY and GOVERNMENT OF	)	
THE VIRGIN ISLANDS DEPARTMENT	)	
OF POLICE,	)	
	)	
Defendants	)	
_____	)	

**MEMORANDUM OPINION**

**Finch, Chief Judge**

This matter comes before the Court upon the motions of Defendant Virgin Islands Housing Authority to dismiss the above-captioned action. For the reasons stated herein, Defendant's motions will be denied.

**I. Background**

Plaintiff Susan Miller brings the instant lawsuit against the Virgin Islands Housing Authority ("VIHA") for sex and age discrimination, alleging as follows. On August 5, 1996, Miller was hired as a Housing Authority Police Recruit Officer for a probationary period of six months. Pursuant to VIHA hiring procedures, Miller's achievement of full employment status was contingent upon her successful completion of a training and testing program administered by

the Virgin Islands Police Department (“VIPD”). Successful completion required scoring an average of seventy percent in three testing areas: academics, physical training and firearms.

Stating that Miller had failed the firearms testing requirement, the VIHA terminated Miller’s employment on February 20, 1997, approximately one week before the end of her six-month probationary period. Miller contests the purported failure and alleges in her Complaint that she was fired as a result of sex and age discrimination. She alleges that as a result of the discrimination she was not permitted to complete the firearms course and was not given the remedial counseling and training required by the training syllabus and provided for male recruits. She further alleges that the discrimination she suffered included unequal training, unequal benefits and unequal application of employment standards. In particular, Miller alleges that she was terminated despite the VIHA allowing male recruits who had failed testing requirements to become peace officers.

On July 22, 1997, Plaintiff filed a discrimination complaint with the federal and Virgin Islands Equal Employment Opportunity Commissions and with the Virgin Islands Department of Labor alleging violations of federal and Virgin Islands law. On February 9, 1998, Plaintiff received a “Notice of Right to Sue within 90 Days.” Plaintiff then filed the instant lawsuit for damages and reinstatement, asserting federal question jurisdiction. Miller’s Complaint alleges as follows: Count I--sex and age discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., and the Age Discrimination Act, 42 U.S.C. § 6102; Count II--discrimination in violation of Virgin Islands law; Count III--wrongful discharge pursuant to the Virgin Islands Wrongful Discharge Act, 24 V.I.C. § 76; Count IV--intentional

infliction of emotional distress; and Count V--negligent infliction of emotional distress. Miller served copies of her Complaint upon the Governor of the Virgin Islands, the Executive Director of the VIHA, the Attorney General of the Virgin Islands and the Commissioner of the VIPD.

Prior to the filing of the instant motions, the parties reached a partial agreement with respect to Miller being rehired by the VIHA. The agreement provided that Miller would be retested in the area of firearms, and that she would be rehired if she successfully completed the retesting. In accordance with the agreement, Magistrate Judge Resnick issued an Order requiring that Miller be retested, and stating that "If Plaintiff passes such test according to standard scoring then within ten (10) days thereof, VIHA shall process whatever paperwork is necessary for rehiring." Magistrate's Order of April 16, 1999. The Order did not provide, and the parties dispute, what was to happen under the agreement if Miller were to fail the firearms retesting. On June 2, 1999, Miller received her second nine-millimeter, semi-automatic pistol qualification course and, according to Defendants, again failed to perform successfully. Miller disputes the purported failure.

By its motions, the VIHA argues that the instant matter should be dismissed on two grounds: (1) for lack of subject matter jurisdiction for failure to exhaust administrative remedies, and (2) pursuant to the pre-trial agreement by the parties, in accordance with the position that the agreement provided for dismissal of the case if Miller were to fail the firearms retesting.<sup>1</sup>

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<sup>1</sup> The Court is of the understanding, based on the representations of VIHA's counsel, that the VIHA does not plan to further its jurisdictional arguments previously made with respect to service of process, insufficiency of process, and the Court's supplemental jurisdiction over non-federal claims.

## II. Jurisdiction

The VIHA argues that the Court lacks jurisdiction as a result of Miller's failure to exhaust her administrative remedies before filing the instant lawsuit. The VIHA maintains that Title VII, at 42 U.S.C. § 2000e, provides that in a matter of alleged discrimination by a government, governmental agency or political subdivision, a complainant must file her administrative complaint with the Attorney General rather than with the Equal Employment Opportunity Commission ("EEOC"). The VIHA thus argues that Miller's filing with the EEOC constituted a failure to properly exhaust her administrative remedies.

The VIHA's argument is incorrect. Title VII, 42 U.S.C. § 2000e-5, provides in pertinent part:

(1) If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. *In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.*

42 U.S.C. § 2000e-5 (emphasis added). In accordance with the foregoing provision, Miller followed proper administrative procedure in filing her complaint with both the Virgin Islands and the United States EEOC, and it is the job of the EEOC to then refer such a claim against a

government agency to the Attorney General.<sup>2</sup>

The VIHA's motion to dismiss for lack of jurisdiction will be denied.

### **III. The Parties' Agreement for Rehire**

The parties in this case agreed that Miller would be retested in firearms and would be rehired if she successfully completed the retesting. Based upon that agreement, the VIHA now argues that the matter must be dismissed because Miller failed the retesting. Miller maintains that the agreement did not provide for dismissal upon her failure, and she further argues that the retest was improperly administered in a discriminatory manner.

For purposes of considering this argument, the Court converts VIHA's motion to dismiss into one for summary judgment. A court should convert a Rule 12(b)(6) motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 56 whenever matters outside the pleadings are presented to and accepted by the court. Hilferty v. Shipman, 91 F.3d 573, 578 (3<sup>rd</sup> Cir. 1996); see also Fed. R. Civ. P. 12(b); 5A Charles Alan Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE § 1366 at 483 (West 1990). The matters outside the pleadings to be considered in this case include: the parties' agreement with respect to retesting, the resulting Order by the Magistrate, scoring sheets of Miller's retesting, her account of the test as stated in her affidavit, testing procedures, telephone records, and the conduct of individuals administering the test. Accordingly, Fed. R. Civ. P. 56 governs the analysis. Under Rule 56, a court will grant summary

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<sup>2</sup> Further, the Court finds a clear federal question based upon Miller's claims under Title VII and the federal Age Discrimination Act. Having federal question jurisdiction, the Court need not address the VIHA's arguments with respect to the existence of diversity jurisdiction.

judgment only if it is clear from the record “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute involving a material fact is genuine where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3<sup>rd</sup> Cir. 1994).

To grant summary judgment in favor of the VIHA in this case, the Court must find that a reasonable jury could conclude only (1) that the parties’ intended by their agreement that Miller’s claims were to be dismissed upon her failure of a properly administered retest, and (2) that such test was properly administered. Resolving all reasonable doubts in Miller’s favor, the Court cannot so find. Genuine issues of material fact remain, and Miller has submitted sufficient evidence upon which a reasonable fact finder could find in her favor.

First, although the Magistrate’s Order articulating the parties’ agreement clearly establishes the parties intent that Miller be rehired upon passing the re-administered test, there is no explicit language in the Order indicating, as the VIHA suggests, that Miller’s case was to be dismissed upon her failure. See Magistrate’s Order of June 2, 1999. Second, Miller has submitted an affidavit and score sheet sufficient to establish a genuine issue of material fact concerning her retesting. She claims that she was not permitted the usual three attempts to qualify as provided on the score sheet, and explains that although two attempts were recorded on her score sheet, her instructor represented one of those attempts as a practice round. The score

sheet indicates that she received only one attempt to qualify. In response to Miller's arguments and evidence, the VIHA replies that one attempt to qualify is standard firearms testing procedure.

Miller further submits telephone records indicating that her test was scored differently than she originally understood it would be scored. Miller points to statements made before the test by Captain Macedon, head of the VIPD Training Academy, indicating that her test would be scored so that the center ring on the target course was valued at ten points per hit, a "St. Croix scoring standard." She claims that after completing her re-examination, she was told that the center ring was worth only five points, consistent with the "St. Thomas scoring standard." Miller understood she was being tested under St. Croix criteria.

Upon consideration of the foregoing facts, this Court finds that genuine issues of material fact exist with respect to the parties' agreement and the administration of Miller's second firearms test. Accordingly, the VIHA's motion on those grounds will be denied.

#### **IV. Conclusion**

In accordance with the above analysis, the VIHA's motions to dismiss and the resulting inquiry into summary judgment are denied. An appropriate Order is attached.

**ENTER:**

**DATED:** June \_\_\_, 2002

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**RAYMOND L. FINCH**  
**CHIEF U.S. DISTRICT JUDGE**

Miller v. VIHA, Civil No. 1998/0089  
MEMORANDUM OPINION  
Page 8.

**ATTEST:**

Wilfredo F. Morales  
CLERK OF THE COURT

**By:** \_\_\_\_\_  
**Deputy Clerk**

cc: Anna Paiewonsky, Esq.  
Mary Faith Carpenter, Esq.